Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Review of the Commission's	)	MM Docket No. 95-92
Regulations Governing Programming	)	
Practices of Broadcast Television	)	
Networks and Affiliates	)	

REPLY COMMENTS OF CBS INC.

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Summary

In its initial comments in this proceeding, CBS showed that, in today's competitive video marketplace, restrictions on clearance provisions in network-affiliate agreements are not necessary to allow the growth of new networks and competing program distributors. Nor are such regulations required to ensure that licensees will retain sufficient control over their stations to fulfill their public interest obligations. On the contrary, deregulation of these aspects of network-affiliate relations would help promote the continued viability of free over-the-air networks by providing them reasonable freedom to bargain for the ensured distribution of their programming -- a freedom already enjoyed by their subscription multichannel rivals.

Despite the sweeping changes in the competitive environment detailed by CBS in its comments, the Network Affiliated Stations Alliance ("NASA") maintains that networks have had -- and continue to have -- such dominance over their affiliates that repeal or modification of the network-affiliate clearance rules would be tantamount to requiring affiliates to forfeit control over their programming. In support of this premise, NASA submits a study by National Economic Research Associates, Inc. ("NERA Study") which purports to show, in effect, that there has been no change in the bargaining power between networks and their affiliates.
The NERA Study is flawed in the following respects:

- The NERA Study is based on the premise that the effects of changes in the video

marketplace on network-affiliate relations should be measured since 1980. By that time, when the Network Inquiry Staff called for repeal of the clearance rules, many of the marketplace changes which have accelerated in the last 15 years were already underway. The continued necessity of the network-affiliate rules should therefore be assessed in relation to the conditions which prevailed at the time of their adoption -- rather than when serious calls were already being made for their repeal.

- In concluding that recent increases in the number of both networks and stations have "[o]n balance ... tend[ed] to favor [the] networks," NERA ignores the distinction between VHF and UHF stations. This omission blinks at basic realities of the television business.

- NERA's own figures demonstrate the viability of operating an independent television station. According to the NERA Study, in 1993 the cash flow margin of the average independent station, although smaller than that of the average network affiliate, was still a healthy 27 percent. The NERA Study therefore does not support NASA's premise that networks are in a position to dominate their affiliates.

- NERA concludes that average affiliate compensation has decreased by 40 percent, adjusted for inflation, since 1980. However, the NERA analysis makes no attempt to compare adjusted increases or decreases in affiliate compensation to adjusted increases or decreases in network profitability during the years in question. The failure of the NERA Study to take such trends into account seriously undermines its analysis of changes in affiliate compensation during the period in question.

- NERA's conclusion that affiliate compensation levels have actually decreased in recent years is also flawed by its failure to account for the large increase in the number of UHF and small market stations affiliated with the three original networks since 1980. Since the networks had more of these lower paid affiliates in 1993 than in 1980, a comparative analysis of compensation during those years which is based on simple average or median figures will be distorted in a downward direction.

- While NERA asserts that the relative growth in network and affiliate profits since 1980 "do[es] not suggest increased affiliate power," its own figures show that, between 1980 and 1993, the average profits of affiliated stations increased at a rate 50 percent greater than those of the three original networks.

- In asserting that clearance rates of network programs have not diminished since 1980, NERA brushes aside the undisputed fact that the total programming offered by the original three networks declined by 25 hours per week between 1977 and 1994. Contrary to the inference NERA would draw, the networks' abandonment of these time periods -- due to low affiliate clearance rates -- is a clear demonstration of affiliates' willingness and ability to reject network programming in favor of alternative local or syndicated programming.

The NERA Study thus falls far short of demonstrating that networks today have the upper hand in bargaining with their affiliates -- much less that they exercise such dominance as to justify government intervention in business negotiations between these parties. Nor do the specific objections which have been raised to repeal or modification of the clearance provisions of the network-affiliate rules withstand examination.

NASA contends that the Commission's proposal to clarify the right to reject rule to exclude economically motivated preemptions of network programming would be "unworkable." CBS respectfully submits that a properly clarified rule would create none of the administrative and definitional difficulties envisioned by NASA. It is entirely possible to craft a clarified right to reject rule which would, in almost all cases, create bright-line standards for affiliates, networks and the Commission.

NASA also suggests that an affiliate's decision to preempt a network program for financial reasons can serve the public interest by permitting the affiliate to present programming that its community "values more highly." This argument proves too much. The same reasoning could be advanced in favor of a rule providing a station with a governmentally-guaranteed right to preempt syndicated programming which it is contractually obligated to carry in order to present other programming which it believes would have greater audience appeal, and therefore be more profitable. Clearly, there would be no public interest basis for such a rule, and the principle is no different with respect to economically motivated preemptions of network programming.

While the proponents of the time option rule in this proceeding envision severely negative consequences if the rule is eliminated, these are high unlikely to occur given the dramatic shift in network-affiliate bargaining power which has taken place since the rule was adopted. We do not believe that time option provisions would be frequently utilized were the rule to be repealed. Such repeal would, nonetheless, allow a network to develop programming for new time periods -- with the assurance of obtaining clearance levels sufficient for commercial viability -- if it were able to convince its affiliate body to accept a time option for that period.

Finally, the exclusive affiliation rule is unnecessary in a competitive environment in which 69 percent of U.S. television households are in DMAs with six or more commercial television stations; more than 70 percent of all television households receive 11 or more over-the-air channels; and the rate of cable penetration in markets with fewer than six commercial television stations is approximately 66 percent. In any event, the arguments made by proponents of the exclusive affiliation rule do not support retaining it as currently written. As the Commission states in its Notice, 84 percent of television households are now in DMA markets with more than four commercial television stations. And there are at least seven commercial television stations in 44 DMA markets, which account for 59 percent of all television households. There can be no possible justification for continuing to apply the exclusive affiliation rule to markets of this size.

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REPLY COMMENTS OF CBS INC.

CBS Inc. ("CBS") respectfully submits these reply comments in the above proceeding, in which the Commission is reexamining a number of its rules regulating the relationship between television networks and their affiliates. We focus primarily on the arguments made by the Network Affiliated Stations Alliance ("NASA")[1] that three rules restricting the ability of networks to bargain for clearance of their programs -- the right to reject rule, the time option rule, and the exclusive affiliation rule -- should be retained as presently written, notwithstanding the Commission's tentative conclusion that the rules can be eliminated or substantially modified without adverse impact on the public interest.[2]

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1 NASA represents the ABC Television Affiliates Association, the CBS Affiliates Association and the NBC Affiliates Association.

2 CBS adheres to the positions taken with respect to the dual network rule and the network territorial exclusivity rule in its initial comments, but does not address those rules herein.

In its comments, NASA asserts that the burden in this proceeding must be on those who advocate elimination of the rules in question.[3] CBS respectfully disagrees. In our view, it is those who would have government impose restrictions on the contractual freedom of private parties who should be required to show that such regulation is essential to serve the public interest, rather than their own economic advantage. As set forth below, neither NASA nor the other proponents of the rules in question has met that burden in this proceeding.

I. Introduction

In its initial comments, CBS showed that, in today's competitive video marketplace, restrictions on clearance provisions in network-affiliate agreements are not necessary to allow the growth of new networks and competing program distributors. Since 1970, a dramatic increase in the number of television stations and an explosion in cable penetration rates has led to the establishment of a fully-competitive fourth broadcast network and the growth of scores of cable networks, all of which have become major purchasers of video programming. In addition, first-run syndication has experienced extraordinary growth, and two nascent broadcast networks affiliated with major Hollywood studios have emerged. These developments were not prompted by the existence of the network-affiliate rules, and their retention is not needed to promote the further expansion of viewer choice promised by new services such as DBS, and the presence on the horizon of the telcos.

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[3] See, Comments of Network Affiliated Stations Alliance, MM Docket No. 95-92 (October 30, 1995) ("NASA Comments") at 4.

Nor, as we have shown, are these regulations necessary to ensure that licensees will retain sufficient control over their stations to fulfill their public interest obligations. With the growth of new networks, and the vastly increased supply of first-quality original syndicated programming, the bargaining power between networks and their affiliates has shifted dramatically. In an environment marked by fierce competition among networks for affiliations in scores of markets across the country, there is no need for concern that the programming choices of affiliated stations will be somehow dictated by their network partners in the absence of government regulation.

Our initial comments also demonstrated that the three original networks have themselves come under increasing competitive pressure, at the same time as these marketplace changes have undermined the rationale for the network-affiliate rules. In this competitive environment, we argued, networks must have reasonable freedom to bargain for the ensured distribution of their programming -- a freedom already enjoyed by their subscription multichannel rivals -- if they are to compete as providers of first-quality programming for free over-the-air television.

Despite the sweeping changes in the competitive environment described by CBS, NASA's comments are based on the premise that networks have had -- and continue to have -- such dominance over their affiliates that repeal or modification of the network-affiliate clearance rules would be tantamount to requiring affiliates to forfeit control over their programming.[4] In support of this premise, NASA submits a study by National Economic Research Associates, Inc. ("NERA Study") which purports to show, in effect, that there has been no change in the bargaining power between networks and their affiliates.

In Section II of these reply comments, we show that the NERA Study does not rebut the common sense conclusion that the bargaining power of affiliates has vastly increased since adoption of the network-affiliate rules, and that networks can in no sense be said to dominate their affiliates today. In Section III, we address the objections raised by NASA and others to the repeal or modification of the particular clearance rules in question.

II. The NERA Study Fails To Rebut The Obvious Conclusion That Affiliate Bargaining Power Has Greatly Increased Since Adoption Of The Network-Affiliate Rules.

1. The NERA Study is Flawed Since it Employs an Arbitrarily Chosen Time Frame to Assess Changes in the Video Marketplace.

As the Commission observes in its Notice of Proposed Rule Making ("Notice"), the broadcasting industry has undergone tremendous change "in the intervening decades" since the adoption of the Report on Chain Broadcasting,[5] at a time when "television was in its

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4 See, e.g., NASA Comments at 37 ("The effect of the Notice's proposed rule changes, taken cumulatively, would render it impossible for local affiliates to exercise local control over their own broadcast stations.").

5 Report on Chain Broadcasting, Commission Order No. 37, Docket No. 5060 (May 1941), modified, Supplemental Report on Chain Broadcasting (October
(continued...)

infancy."[6] Yet the NERA Study is based on the premise that the effects of those changes should be measured since 1980 -- when the Network Inquiry Special Staff issued its report calling for repeal of the clearance rules[7] -- rather than from the time of their adoption. In itself, this arbitrarily chosen time frame for assessing changes in the video marketplace calls into question the validity of the NERA Study.

Even at the time of the Barrow Report[8] in 1957 -- let alone when the network-affiliate rules were applied to television in 1946[9] -- the television marketplace was radically different than it is today. As summarized in the comments of the National Broadcasting Company, Inc., when the Barrow Report was adopted

> There were only three broadcast networks -- CBS, NBC and ABC -- which accounted for close to 70% of all national television time sales, with CBS and NBC accounting for over 60%; during the three prime evening hours, the three networks accounted for almost 78% of the total programs carried by all the commercial stations in the country; there were 431 television stations on the air, only 35 of which were not affiliated with one of the three networks; of the 233 television markets, only 16 had more than three television stations and only 53

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[5](...continued)
1941), appeal dismissed sub nom. NBC v. United States, 47 F. Supp. 940 (S.D.N.Y. 1942), aff'd, 319 U.S. 190 (1943) ("Chain Broadcasting Report").

6 Notice at ¶4.

7 Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Final Report (Oct. 1980) at 475-91 ("Network Inquiry Report").

8 Network Broadcasting, Report of the Network Study Staff to the Network Study Committee (Oct. 1957), reprinted in Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Congress, 2d Sess. (1958) ("Barrow Report").

9 Amendment of Part 3 of the Commission's Rules, 11 Fed. Reg. 33 (Jan. 1, 1946).

> had more than two stations. Thus, local stations were critically dependent on the three national networks as a programming source; and a hypothetical fourth network would then either have had to confine itself to the 16 markets where there were four or more stations or compete with the other three networks for access to their affiliates.[10]

By 1980, when the Network Inquiry Staff called for repeal of the clearance rules, many of the marketplace changes which have accelerated in the last 15 years were already underway. Because the continued necessity of the network-affiliate rules should be assessed in relation to the conditions which prevailed at the time of their adoption -- rather than when serious calls were already being made for their repeal -- the NERA Study is flawed at the outset.

As we now show, however, the NERA Study in any event fails to demonstrate such "dominance" by the networks over their affiliates as would justify retention of the rules in question.

2. <u>Contrary to NERA's Analysis, the Growth in the Number of Competing Networks Has Clearly Increased the Bargaining Power of Affiliated Stations</u>.

The NERA Study observes:

> First among the external factors that may affect the network-affiliate relationship is the number of alternatives available to networks and affiliates. In local markets with more networks than stations, power tends to shift to the stations. The reverse is true in local markets with more stations than networks.[11]

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10 <u>Comments of National Broadcasting Company, Inc.</u>, MM Docket 95-92 (October 30, 1995) at 14-15 (citations to <u>Barrow Report</u> omitted).

11 <u>NERA Study</u> at 3 (citations omitted).

NERA asserts that, as compared to 1979, "there are now more local markets, serving more television households, in which the number of stations exceeds the number of networks" and "fewer markets ... with more networks than stations."[12] Based on this premise, NERA concludes that recent increases in the number of both networks and stations have "[o]n balance ... tend[ed] to favor [the] networks."[13]

As NERA acknowledges, the figures it presents in support of these conclusions make no distinction between VHF and UHF stations.[14] This omission simply blinks at basic realities of the television business. If any demonstration were necessary, the fierce competition waged by the four major networks for VHF affiliates over the last eighteen months irrefutably establishes their strong preference for VHF stations.[15] Therefore, as the Notice in this proceeding suggests, only in the four percent of DMA markets in which the number of VHF stations exceeds the number of major networks would those networks appear to have the

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12 Id.

13 Id.

14 Id. at 5.

15 As noted in our initial comments, the preference of networks for VHF affiliates is accounted for not only by the lower channel positions and stronger signals of such stations, but also by the strategic importance of an affiliate's early evening newscast for the performance of the network's prime time schedule. It is historically true that VHF stations typically have strong news departments, while UHF stations do not. See, Comments of CBS Inc., MM Docket No. 95-92 (October 30, 1995) ("CBS Comments") at 22, n. 54, citing A Critique of the Comments of the Station Representation Association and the MiCRA Analysis with Regard to MM Docket No. 95-90, Wilkofsky Gruen Associates Inc. at 9-10, submitted with Reply Comments of CBS Inc., MM Docket No. 95-90 (September 27, 1995).

bargaining advantage posited by the NERA Study.[16]

The NERA Study also excludes the United Paramount and WB Networks from its analysis because of their emerging status. As noted in our initial comments, however, these new services provide stations with an important alternative to major network affiliation, as does the rapid growth in first-run syndication. The Commission has only recently expressed confidence, in repealing the secondary affiliation rule, that independent stations may "remain viable entities" by looking to these and other alternatives to the three original networks for programming.[17] New networks can therefore not be realistically ignored in assessing the ability of affiliates to bargain on an equal basis with their network partners.

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16 Notice at ¶12. The NERA Study attempts to minimize the VHF/UHF distinction by arguing, inter alia, that, "since many markets now have both VHF and UHF affiliates of the four [major] networks," the fifth station available for affiliation is likely to be competing against a station of its own frequency type. NERA Study at 5. This, of course, takes account only of competition at the margin, and ignores the intense competition between the four (or six) networks to secure an affiliation with a VHF station. As long as there are fewer VHF stations in a market than there are networks, each of these VHF stations will enjoy considerable bargaining leverage with respect to its network. In any event, as the Commission has recognized, even in those markets where there are more stations than networks, it does not follow that the networks have "undue market power...sufficient...to justify governmental intervention." Notice at ¶13.

17 Review of the Commission's Regulations Governing Television Broadcasting, 10 FCC Rcd 4538, 4542 ("Secondary Affiliation Report and Order"). See also, Review of Rules and Policies Concerning Network Broadcasting By Television: Elimination or Modification of Section 73.658(c) of the Commission's Rules, 4 FCC Rcd 2755, 2756 (1989) ("Two Year Affiliation Rule Report and Order") ("[n]umerous sources of non-network programming are now available to stations, making affiliation but one option among many available means of obtaining programming").

The most persuasive indication of the present state of network-affiliate relations, however, is what is happening in individual negotiations between stations and networks. Given the reported increases in affiliate compensation of at least $200 million since the announcement in May 1994 of the Fox-New World agreement,[18] it is futile to argue that the emergence of new networks has not resulted in a dramatic shift of bargaining power from networks to their affiliates. There is nothing in the NERA Study to rebut the common sense conclusion that such a shift has, in fact, taken place.

3. While Affiliation Undoubtedly Remains an Attractive Alternative for Television Stations, They Are Not So Economically Dependent on Affiliated Status as to Confer Market Power on Networks.

In its comments, NASA argues that the bargaining power of networks remains undiminished[19] based on NERA's conclusion that "affiliation is as attractive an alternative to stations today as it was in 1980."[20] While NERA acknowledges that it is "[not] always more profitable for an independent station to become an affiliate," it states that "a station considering affiliation could, on average, reasonably expect its profitability to improve."[21]

We do not doubt that network affiliation remains an attractive alternative --

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18 See, Broadcasting and Cable, "CBS's Tony Malara: In the Storm of the Eye," December 19, 1994 at 34.

19 NASA Comments at 10.

20 NERA Study at 8.

21 NERA Study at 9.

indeed the most attractive alternative -- for operation of a television station. This does not mean, however, that affiliation is so essential to a station's survival that a network will be in a position to "dominate" its affiliates -- and that special rules governing the contractual relations between the parties are therefore necessary.

Thus, NERA's own figures demonstrate the viability of independent status. According to the NERA study, in 1993 the cash flow margin of the average independent station, although smaller than that of the average network affiliate, was still a healthy 27 percent.[22] It is therefore clear, as the Commission recently found, that in recent years independent television stations have "grown and prospered."[23]

Indeed, in some cases, stations may find independent status to be preferable to becoming an affiliate -- or at least sufficiently attractive to support very hard bargaining with a potential network partner. This fact is dramatically illustrated by CBS's recent experience in the Milwaukee market. In the fall of 1994, CBS was scheduled to lose its longtime outlet in Milwaukee, WITI-TV, which was to become a Fox affiliate as a result of the Fox-New World agreement. As part of its effort to secure a new affiliate in Milwaukee, CBS had discussions with, among others, Sinclair Broadcast Group, Inc. ("Sinclair"), the owner of WCGV-TV, which was soon to lose its Fox affiliation. These discussions did not result in an agreement because

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22 NERA Study at Table 9A.

23 See, e.g., Report and Order In re Review of the Prime Time Access Rule, MM Docket No. 94-123 at ¶70 (released July 31, 1995) ("PTAR Report and Order").

Sinclair made clear that it would be unwilling to carry the CBS Television Network schedule during entire portions of the broadcast day.

Although not acceptable to CBS, this was an entirely legitimate position for Sinclair to take. It is ironic, however, that, in its comments in this proceeding, Sinclair cites its experience with WCGV as an example of the devastating impact on a station of loss of affiliation, and the resultant power supposedly wielded by a network over its affiliates.[24] Although Sinclair now says that CBS "chose [not] to affiliate ... with [WCGV],"[25] the fact is that it took a very aggressive negotiating position with the network -- a position obviously reflecting its confidence that WCGV could prosper as an independent station.[26]

In sum, in today's video marketplace, there are viable alternatives to traditional

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24 In its comments, Sinclair states:

> [A] station which loses its network affiliation is a station on the road to marginality, unprofitability, and possibly even extinction. The loss of a network affiliation -- and the cost-effective programming and brand identity that affiliation provides -- is a prospect that is genuinely feared by the affiliate. As a result, it is a tool by which a network can exercise enormous bargaining power over an affiliate.

Comments of Sinclair Broadcast Group, Inc., MM Docket No. 95-92 (October 30, 1995) at 9.

25 Id. at 11.

26 The station with which CBS ultimately affiliated in Milwaukee, WDJT-TV, has a significantly smaller coverage area than WCGV. See, 1995 Television and Cable Factbook, Stations Volume No. 63, at A-1220 and A-1221. We also note that, in the February and May 1995 ratings periods, WCGV had a slightly larger total day audience share operating as an independent than did WDJT-TV, the new CBS affiliate in Milwaukee. Nielsen Station Index, February and May 1995.

network affiliation. The NERA Study does not demonstrate the contrary.

4. NERA's Analysis of "Direct Measures of the Network-Affiliate Relationship" Fails to Show that Networks Hold Undue Bargaining Power Over Affiliates in Today's Video Marketplace.

NERA next purports to examine "more direct measures" of the relative bargaining position of networks and their affiliates. These are said to include (1) the amount of compensation received by affiliates from networks; (2) the growth in affiliate versus network profitability; and (3) the extent to which affiliates clear network programming. As we show below, NERA's analysis of each of these factors is flawed, and does not support the conclusion that networks hold undue bargaining power over their affiliates in today's video marketplace.

a. Compensation

Using figures for 1993 -- which exclude the $200 million in compensation increases estimated to have resulted from the affiliate realignments of 1994 -- NERA concludes that average affiliate compensation has decreased by 40 percent, adjusted for inflation, since 1980.[27] The conclusion NERA would apparently have the Commission draw is that, despite the

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[27] NERA observes that the "typical" -- i.e., the median -- affiliate "actually had lower compensation in 1993 before adjustment for inflation." NERA Study at 10 (emphasis in the original). While NERA's analysis of compensation received by the median affiliate is subject to the same criticisms made in the text of its examination of average compensation, we do not believe use of a median figure is appropriate for comparative purposes. As discussed at page 14 infra, the three original networks now have many more UHF and small market affiliates than they did in 1980. Since such stations generally receive lower total compensation than (continued...)

rise of the Fox Network, the emergence of the United Paramount and WB networks, and the vastly increased availability of first-run syndicated programming, affiliate bargaining power has actually diminished in recent years. There is no validity to this conclusion.

NERA correctly states that "compensation is a way that networks share profits with their affiliates."[28] Notwithstanding this recognition, however, the NERA analysis makes no attempt to compare adjusted increases or decreases in affiliate compensation with adjusted increases or decreases in network profitability during the years in question.[29] As shown in our initial comments, each of the three original networks has experienced a precipitous decrease in its audience share since 1980,[30] and an accompanying decline in its share of national advertising revenues.[31] One would expect these trends to be reflected in the rates at which affiliate compensation has increased. The failure of the NERA Study to take such trends into account

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[27](...continued)
VHF or large market affiliates, use of a median figure for purposes of comparing present-day compensation to that in 1980 clearly has a distortive effect.

[28] NERA Study at 10.

[29] As the NERA analysis itself shows, average affiliate profits increased at a rate 50 percent greater than the profits of the three original networks between 1980 and 1993. Id. at Table 15.

[30] See, CBS Comments at 12-13. For example, the average total-day audience share for each of the three original networks' affiliates attributable to dayparts programmed by the networks dropped from 17 during the 1980-81 season to 12 during the 1993-94 season -- a decline of almost 53 percent. See, An Economic Analysis of the Prime Time Access Rule, at 19 and Appendix A, Table A-9, Economists Incorporated (March 7, 1995), submitted on behalf of ABC, CBS and NBC in MM Docket No. 94-123 ("PTAR Joint Economic Study.").

[31] See, CBS Comments at 13-14; PTAR Joint Economic Study at 20 and Appendix A, Table A-10.

therefore seriously undermines its analysis of changes in affiliate compensation during the period in question.

NERA's conclusion that affiliate compensation levels have actually decreased in recent years is also flawed by its failure to account for the large increase in the number of UHF and small market stations affiliated with the three original networks since 1980.[32] These stations generally receive lower total compensation than VHF or large market affiliates.[33] Since the networks had more of these lower paid affiliates in 1993 than in 1980, a comparative analysis of compensation during those years which is based on simple average or median[34] figures will be distorted in a downward direction. To meaningfully assess compensation trends, it would have been necessary to look at the compensation paid to the same group of stations during the years in question, rather than at average or median figures for the affiliate bodies of the networks at large.

Similarly, the NERA analysis may be distorted by the fact that the total programming offered by the three original networks to their affiliates declined by 25 hours between 1977 and 1994.[35] Since compensation is obviously not paid for hours during which network programs are not broadcast, this fact as well would tend to push downward the total

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32 According to the NERA Study, the three original networks collectively had 37 more UHF affiliates in 1995 than they did in 1980. NERA Study at Table 4.

33 Although total compensation payments to small market stations will generally be less than those to affiliates in larger markets, small market stations may receive more compensation on a per household basis. See, NERA Study at Table 14.

34 See, discussion in note 27, supra.

35 PTAR Joint Economic Study at 23, 90-91.

compensation paid by the networks in recent years, while saying nothing about the rates of compensation paid to individual stations.

For all of these reasons, when the compensation data presented by NERA is subject to scrutiny, it does not meaningfully call into question what would appear to be obvious on its face -- increased competition between the networks for affiliations has benefitted affiliated stations, and significantly enhanced their bargaining power with respect to those networks.

b. Network and Affiliate Profitability

NERA further asserts that the relative growth in network and affiliate profits since 1980 "do[es] not suggest increased affiliate power."[36] In fact, the data presented by NERA suggest precisely that.

Thus the NERA figures show that, between 1980 and 1993, the average profits of affiliated stations increased at a rate 50 percent greater than those of the three original networks.[37] And while NERA observes that network profits increased "slightly" more than those

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[36] NERA Study at 11.

[37] NERA Study at Table 15. NERA attempts to blunt the impact of this finding by arguing that it "may be influenced by the large size and rapid increase in the profits of the network owned-and-operated ('O&O') stations." NERA Study at 11. NERA also asserts that "if networks and O&Os are counted as a single entity, their profits grew substantially more than the average affiliate." Id. There are several obvious problems with these arguments.

(continued...)

of the typical (i.e., median) affiliate, it is inappropriate to use a median figure for comparative purposes here, since this will exaggerate the effect of the networks' significantly increased affiliation with UHF and small market stations since 1980 -- stations which may be expected to show lower total profits than VHF or larger market affiliates.[38]

Once again, the evidence presented by the NERA Study simply fails to support the conclusions which it seeks to draw.

c. Network Clearance Rates

Finally, NERA asserts that clearance rates of network programs have not diminished since 1980, and suggests that this is a further indication of network power over affiliates. In so contending, NERA brushes aside with a passing reference the undisputed fact

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[37](...continued)
First, since NERA has chosen to present average profit data for all network owned and affiliated stations in one category -- rather than separately breaking out figures for independently-owned affiliates -- it cannot now be heard to argue that data organized in a different manner might have better supported its position. Moreover, the NERA data purporting to show the "large size and rapid increase" in profits of network-owned stations is not presented on a per station basis. Since the network owned-station groups have significantly grown since 1980, it is hardly surprising that the total profits of those groups has also significantly increased. Finally, since station ownership and the operation of a television network are different businesses, there is no basis whatever for NERA's suggestion that the profits of network-owned station groups and the networks themselves should be lumped together for purposes of the present analysis.

[38] See discussion in footnote 27, supra. Indeed, the inclusion of these additional UHF and small market stations in NERA's figures for average affiliate profits in 1993 would also tend to understate the increase in such profits over those of 1980.

that the total programming offered by the original three networks declined by 25 hours per week between 1977 and 1994.[39] Contrary to the inference NERA would draw, the networks' abandonment of these time periods -- due to low affiliate clearance rates[40] -- is a clear demonstration of affiliates' willingness and ability to reject network programming in favor of alternative local or syndicated programming.[41]

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39 PTAR Joint Economic Study at 23, 90-91.

40 While virtually ignoring the networks' abandonment of entire time periods, the NERA Study notes that clearance rates in prime time have increased by a statistically insignificant amount. NERA Study at 11 and n. 27. Given the demonstrated willingness of affiliates not to clear network programming in other dayparts, it would appear fair to assume that high prime time clearance rates are attributable to the popularity of prime time network programming. See PTAR Report and Order at ¶106 ("high clearance rates do not necessarily indicate undue network leverage; they may simply reflect the popularity and efficiencies of network programming").

41 As noted in our initial comments, CBS's experience in this regard is exemplative. In September 1993, CBS ceased supplying programming to its affiliates between 10 and 11 AM. CBS's abandonment of this time period was caused by the unwillingness of a sufficient number of affiliates to clear the programming being offered. The percentage of national household coverage by affiliates clearing the 10-10:30 AM portion of the hour decreased from 90 percent in 1986 to 49 percent at the time the decision was made to abandon the hour. National coverage for 10:30 to 11 AM decreased from 84 percent to 61 percent over the same period. See Nielsen Television Index. A similar problem of non-clearance caused the abandonment of the 4-4:30 PM time period in September 1986, after national coverage had declined to 26 percent. Id.